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No. 88-1503

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians
LESTER L. and JOYCE CRUZAN,
Petitioners,

V.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH,
et al.
Respondents.

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America is a national grassroots Orthodox Jewish movement with tens of thousands of members across the United States. It was founded in 1922 as the American arm of the world-wide Agudath Israel movement, for the purpose of uniting the American

Orthodox Jewish community under its organizational banner. The movement is led, and its policies determined, by a group of prominent senior Orthodox rabbinical figures respected broadly as outstanding scholars of Jewish law and decisors of Jewish policy.

Informed by classical Jewish tradition which teaches that all human life is sacred, and possessed of the firm view that laws that undermine the sanctity of human life send a message that is profoundly dangerous for all of society, Agudath Israel of America speaks out frequently on a broad panoply of public policy issues that arise at the onset and conclusion of the human life cycle. In the Court's 1988-89 Term, for example, Agudath Israel of America submitted a brief as *amicus curiae* in the abortion rights case of *Webster* v. *Reproductive Health Services* (decision reported at 109 S.Ct. 3040 (1989)). More directly relevant to the issues involved in the instant case, Agudath Israel of America submitted an *amicus curiae* brief to the New York Court of Appeals in last year's "right to die" case of *Matter of Westchester County Medical Center* (decision reported at 72 N.Y. 2d 517, 531 N.E. 2d 607 (1988)); and has testified before various state legislative bodies on such issues as DNR (Do Not Resuscitate) orders, health care directives, and determination of death.

Agudath Israel of America's interest in this case is especially keen because it represents the first time the Court has had occasion to address some of the most fundamental questions concerning human life: its value to society, its intrinsic sanctity, its voluntary termination, its involuntary termination. It is a basic principle of Jewish law

and ethics that "[m]an does not possess absolute title to his life or body." J.D. Bleich, *The Quinlan Case: A Jewish Perspective,* reprinted in *Jewish Bioethics* 266, 270 (Hebrew Publishing Co. 1979). Agudath Israel of America believes that recognition of that teaching, as expressed in the general disapprobation of suicide and euthanasia, has served as one of the pillars of civilized societies throughout the generations.

Moreover, as representatives of a people whose numbers were decimated only half-a-century ago by a society that "progressed" from its "enlightened" practices of "mercy killing" to the mass slaughter of millions of human beings deemed physically or racially "inferior," Agudath Israel of America is particularly sensitive to the legal assignment of diminished levels of life protection based on diminished levels of life quality. We share the concerns expressed by Siegler & Weisbard, *Against the Emerging Stream: Should Fluids and Nutritional Support be Discontinued?,* 145 Archives of Internal Medicine 130-31 (1985):

> "We have deep concerns about accepting the practice of withholding fluids from patients, because it may bear the seeds of unacceptable social consequences. We have witnessed too much history to disregard how easily a society may disvalue the lives of the unproductive. The 'angel of mercy' can become the fanatic, bringing the 'comfort' of death to some who do not clearly want it, then to others who 'would really be better off dead,' and finally, to classes of 'undesirable persons,' which might include the terminally ill, the permanently unconscious, the

> severely senile, the pleasantly senile, the retarded, the incurably or chronically ill, and perhaps, the aged. . . . In the current environment it may well be convenient - and all too easy - to move from recognition of an individual's 'right to die' (to us, an unfortunate phrasing in the first instance) to a climate enforcing a 'duty to die.'"

This case affords the Court a historic opportunity to offer constitutional guidance in an area of law and policy that has emerged as one of the most morally challenging in contemporary society. The choices before the Court are stark; the issues to be decided, profound; and the stakes, enormous. As detailed below, Agudath Israel of America believes that it would represent a significant and alarming departure from settled constitutional precedent -- and from fundamental values long-cherished by civilized societies -- were the Court to conclude that the Fourteenth Amendment's liberty/privacy protections preclude the states from asserting their interest in the preservation and sanctity of human life in cases like this.

Through their respective counsel, the parties have consented to the appearance of Agudath Israel of America as *amicus curiae*.

SUMMARY OF ARGUMENT

I. It is axiomatic that the Court here has no occasion to review the Missouri Supreme Court's findings on issues of fact or rulings on issues of state law. Accordingly, the Court's analysis should proceed on the assumption that Nancy Cruzan never clearly indicated whether she would want life-sustaining nutrition and hydration discontinued under her current medical circumstances; that the continued provision of nutrition and hydration is neither painful nor burdensome to her; that Missouri's statutory and common law demonstrate its great interest in the preservation of human life and the sanctity of human life, both of which are present in this case to a substantial degree; and that neither Missouri's common law nor its state constitution compel the hospital to discontinue the patient's life support.

The sole issue for the Court to determine, then, is whether the federal constitution would compel the hospital to comply with the patient's parents' request to terminate nutrition and hydration. To reach an affirmative conclusion on that question, and reverse the ruling of the Missouri Supreme Court, the Court would have to hold that a state's asserted interest in protecting human life -- its preservation and its sanctity -- is not sufficiently compelling to override any liberty/privacy right a non-terminal patient may have to decline or discontinue life-sustaining intervention including nutrition and hydration. The Court would further have to hold that states may not insist that third parties who seek to assert the right to refuse life-sustaining measures on behalf of an incapacitated patient must present clear and

convincing evidence that the patient herself would have exercised the right. As demonstrated in Points II and III, neither of those holdings would be consistent with settled constitutional jurisprudence.

II. As to the first point -- the strength of a state's interest in the preservation and sanctity of human life vis-a-vis an individual patient's right to decline life-sustaining intervention -- American society has long operated on the premise that protecting human health and human life is one of the most basic of all governmental purposes. This premise has found its expression in longstanding proscriptions against suicide and euthanasia; and in several contexts of the law in which even fundamental constitutional rights have been held subservient to the state interest in life. Accordingly, even if an individual's desire to refuse medical intervention rises to the level of a "fundamental" constitutional right, the state's interest in the preservation and sanctity of human life as defined by the Missouri Supreme Court is an interest of the highest order, sufficiently compelling to justify abridgment of the liberty/privacy right under the circumstances of this case.

III. As to the second point -- the constitutional authority of a third party to assert the patient's right to refuse life-sustaining intervention when the patient is incapacitated -- any constitutionally grounded liberty/privacy right to refuse such intervention is inherently personal to the patient. Its assertion by third parties is capable of serious abuse, intended and unintended. States should thus be free to insist that a third party who seeks to assert that right on behalf of an

incapacitated patient must present the highest caliber of evidence that the patient would have asserted it were he or she competent to do so. Accepting (as the Court must) the Missouri Supreme Court's factual finding that no such evidence is present here, Missouri should be permitted to maintain the patient on her feeding tubes.

ARGUMENT

I. THE NARROW ISSUE BEFORE THIS COURT IS WHETHER THE FEDERAL CONSTITUTION PROHIBITS MISSOURI FROM CONTINUING TO PROVIDE NUTRITION AND HYDRATION UNDER THE CIRCUMSTANCES OF THIS CASE

When Lester and Joyce Cruzan commenced this declaratory judgment proceeding to compel the Mount Vernon State Hospital to discontinue life-sustaining nutrition and hydration support from their daughter Nancy, the courts of Missouri were presented with a host of factual and legal questions:

> -- Did Nancy, prior to becoming incompetent, clearly indicate what she would have wanted done under the circumstances? [The Missouri Supreme Court concluded that she had not: "statements attributed to Nancy in this case are . . . unreliable for the purpose of determining her intent." 760 S.W.2d at 424.]
>
> -- How invasive, painful and burdensome is Nancy's nutrition and hydration support? [Not significantly, found the Missouri Supreme Court:

"Nancy's care requirements, while total, are not burdensome to Nancy. The evidence at trial showed that the care provided did not cause Nancy pain. Nor is that care particularly burdensome for her, given that she does not respond to it." *Id.*]

-- What is the nature of Missouri's state interest in this case? [Drawing upon principles of common law and Missouri's restrictive "living will" statute, the Missouri Supreme Court held that the state had a strong interest in both the preservation and sanctity of human life: "'The concern for preservation of the life of the patient normally involves an interest in the prolongation of life' . . . The state's interest in prolonging life is particularly valid in Nancy's case. Nancy is not terminally ill. . . . The state's concern with the sanctity of human life rests on the principle that life is precious and worthy of preservation without regard to its quality." *Id.* at 419 (citation and emphasis omitted).]

-- Does the common law recognition of a patient's right generally to refuse medical treatment require the hospital to terminate Nancy's nutrition and hydration at her parent's request? [No, ruled the Missouri Supreme Court: "The common law right to refuse treatment is not absolute. It too must be balanced against the state's interest in life . . . Nor do we believe that the common law right to refuse treatment -- founded in personal autonomy -- is exercisable by a third party absent formalities." *Id.* at 421, 425.]

-- Does the Missouri state constitution guarantee the right to refuse life-sustaining treatment? [The Missouri Supreme Court held that it does not: "We . . . find no unfettered right of privacy under our constitution that would support the right of a person to refuse medical treatment in every circumstance." *Id.* at 417.]

-- Does the federal constitution demand that the hospital discontinue Nancy's nutrition and hydration under the circumstances of this case? [No, said the Missouri Supreme Court: "Based on our analysis of the right to privacy decisions of the Supreme Court, we carry grave doubts as to the applicability of privacy rights to decisions to terminate the provision of food and water to an incompetent patient . . . [H]owever, even if we recognize such a broadly sweeping right of privacy, a decision by Nancy's co-guardians to withdraw food and water under these circumstances cannot be sustained." *Id.* at 418 (footnote omitted).]

At this stage of the proceeding, however, the issues have narrowed considerably. It is axiomatic that in reviewing cases like this, the United States Supreme Court does not consider whether the state court correctly evaluated the evidence or correctly determined issues of state policy or law. *See, e.g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874). Accordingly, the only issue before the Court at this point is the final one mentioned above -- whether the federal constitution precludes Missouri from continuing to provide Nancy with life-sustaining nutrition and hydration.

To find that Missouri is so precluded, the Court must reach two discrete legal conclusions. First, the Court must conclude that a state's interest in the preservation and sanctity of human life is not sufficiently compelling to override a non-terminal patient's right to refuse life-sustaining medical intervention. Second, the Court must conclude that third parties have the constitutional authority to assert that right on behalf of an incapacitated patient even in the absence of clear and convincing evidence that the patient herself would have exercised the right.

Both of these legal conclusions are prerequisites to a reversal of the decision below. However, as demonstrated in Points II and III *infra*, neither conclusion is compelled by constitutional precedent -- and either conclusion would break troublesome new moral ground.

II. MISSOURI'S INTEREST IN THE PRESERVATION AND SANCTITY OF HUMAN LIFE IS A "COMPELLING" STATE INTEREST; IT SHOULD GENERALLY TAKE PRECEDENCE OVER WHATEVER LIBERTY/PRIVACY RIGHT PATIENTS MAY HAVE TO DECLINE LIFE-SUSTAINING MEDICAL INTERVENTION

"It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint." *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2341 (1989). From that extension has emerged what the Court has referred to as a right of "privacy," the essence of which is that there are

certain decisions so personal that their protection, in the oft-quoted phrases of Mr. Justice Cardozo, is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

The Court has never before had occasion to consider whether the Fourteenth Amendment's liberty/privacy protections encompass a patient's common law right to decline medical intervention. As the Missouri Supreme Court intimated below, 760 S.W.2d at 418, the question is far from settled. The Court on several occasions has expressed its resistance to finding new fundamental rights under the Fourteenth Amendment. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) ("There should be ... great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."); *Paul v. Davis*, 424 U.S. 693 (1976) (rejecting the contention that a state's tortious defamatory publication of an individual's status as a shoplifter deprived the individual of Fourteenth Amendment liberty/privacy rights). A number of state courts have expressly declined to decide "right to die" cases on constitutional grounds, resting their decisions instead on principles of common law. *E.g., Matter of Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 70, *cert. denied* 454 U.S. 858 (1981); *Matter of Conroy*, 98 N.J. 321, 486 A.2d 1209, 1223 (1985). *See generally*, Tribe, *American*

Constitutional Law, sec. 15-11 at 1365-66 (2d Ed. 1988); Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 Fordham L. Rev. 1, 5-9 (1975). [1]

However, since Agudath Israel of America's interest as *amicus curiae* extends not so much to the question of the *existence* of a liberty/privacy right to decline medical treatment as it does to the question of the ***strength*** of any such right when balanced against the state's countervailing interest in protecting human life, we proceed on the assumption that the Fourteenth Amendment does afford some measure of protection to a patient's right to refuse certain forms of medical intervention.

But that assumption by no means settles the issue. Even liberty/privacy rights that are "fundamental" are not absolute. They must yield to state interests that are "compelling." *E.g., Roe v. Wade*, 410 U.S. 113, 153-56

[1] The fact that the life-sustaining intervention sought to be terminated in this case is nutrition and hydration rather than medical treatment is yet an additional factor to be considered in determining whether Nancy Cruzan's alleged right deserves to be characterized as a "fundamental" liberty/privacy right. There is neither historical nor contemporary consensus that provision of food and water is on the same plane -- medically, morally or legally -- as invasive medical treatment. This lack of consensus is reflected in the fact that many of the states that have enacted "living will" laws have expressly refused to extend to an individual the right to decline life-sustaining nutrition and hydration. *See* statutes collected in Williams, *The Living Will Sourcebook* (P. Gaines Co. 1986). If one of the bases upon which a right is deemed "fundamental" is its broad recognition and acceptance in state law, see *Michael H. v. Gerald D., supra*, 109 S.Ct. at 2341-44 (plurality opinion), that basis is less obviously present with respect to decisions to refuse nutrition and hydration than it is with respect to decisions to refuse medical treatment.

(1973). A state's interest in the preservation and sanctity of human life is such an interest.

Roe v. Wade is directly on point. The Court determined that a woman's right to an abortion is a "fundamental" liberty/privacy right protected under the Fourteenth Amendment, shielded against governmental abridgment absent a compelling countervailing state interest. 410 U.S. at 152-56. At the same time, the Court expressly acknowledged that at certain stages of a woman's pregnancy, the state's interests in preserving maternal health and fetal life do rise to the level of compelling interests, thereby justifying certain state regulation of and restrictions upon a woman's exercise of her fundamental abortion right:

> "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and . . . it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"

410 U.S. at 162-63(emphasis in original).

The governmental interest in protecting potential human life becomes compelling, the Court held, at the stage of fetal viability -- at which point states "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-64.[2] In so doing, the Court firmly endorsed a state's authority to determine that its interest in human life -- even potential human life, at least at the stage of viability -- outweighs a woman's fundamental liberty/privacy right to terminate her pregnancy.

Even more directly on point for our purposes -- because of its explicit acknowledgment of the compelling state interest in protecting the life not merely of some third party (such as the viable fetus), but even of the person seeking to endanger her own life in the course of exercising her fundamental liberty/privacy right -- is *Roe v. Wade*'s analysis of the state's interest in protecting maternal health. The Court looked to the fact that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth," and concluded that the state's interest in protecting the mother's health becomes compelling at the beginning of the second trimester. 410 U.S. at 163. To safeguard its compelling interest from that point and on:

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[2] *Cf. Webster v. Reproductive Health Services* 109 S.Ct. 3040, 3057 (1989) (plurality opinion) (suggesting that the state's interest in potential human life be deemed compelling even prior to the stage of fetal viability).

> "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like."

410 U.S. at 163. Stated otherwise, from the moment that abortion poses a greater risk to the mother than normal childbirth, a state's interest in protecting maternal health and life is sufficiently compelling to allow it to determine that a woman may not exercise her fundamental constitutional right to abortion if in so doing she would fail to adhere to state regulations reasonably designed to make the abortion procedure a safe one.

Roe v. Wade thus stands for the proposition that states may inhibit an individual's exercise of a fundamental constitutional right in order to protect life -- the life of the fetus, from the moment of viability; and even the life (and health) of the individual herself, from the moment the unregulated exercise of the right would pose a serious danger to her. This basic principle has been established in a wide variety of other contexts as well. Examples include: a state's authority to compel its citizens to submit to vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); a state's authority to insist that a child receive life-sustaining

treatment even over the religiously motivated opposition of his parents, *Jehovah's Witnesses v. King County Hospital Unit*, 390 U.S. 598 (1968); a state's authority to restrict the handling of poisonous snakes and drinking poisonous substances as part of a religious ceremony, *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976); a state's right, in the exercise of its police power, to enact laws designed to protect users of highways "even against the consequences of their own action," *Bisenius v. Karns*, 42 Wis. 2d 42, 165 N.W.2d 377,382, *appeal dismissed* 365 U.S. 709 (1969).

It is this general principle -- that rights of personal autonomy must ordinarily yield to countervailing compelling interests in human life -- that provides the legal and moral foundation for society's negative view of suicide and euthanasia. A case on point is *Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S. 2d 623 (4th Dept. 1982). A state prisoner sought to starve himself to death, citing his "constitutional right to privacy." The New York appellate court rejected his claim:

> "Even overlooking the fact that Chapman's status as a prisoner severely delimits his constitutional privileges, it is self-evident that the right to privacy does not include the right to commit suicide. For, as has been repeatedly stated, only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy. To characterize a person's self-destructive acts as entitled to that constitutional protection would be ludicrous. . . .

> "The fact that the State has a legitimate and compelling interest in preventing suicide is demonstrated by several statutes. A person may be involuntarily committed if he has a mental illness likely to result in serious harm to himself. Aiding another to commit suicide is a felony, as is promoting a suicide attempt. Conversely, a person is justified in using the physical force necessary to thwart a person who is about to commit suicide."

87 A.D.2d at 68 (citations omitted). *See also In re Caulk*, 125 N.H. 226, 480 A.2d 93 (1984).

The same underlying principle should apply in the context of decisions to refuse or discontinue life-sustaining medical intervention. Even if the right to make such decisions rises to the level of a fundamental right, the right should be subject to the state's compelling interest in human life. It may be, as the New Jersey Supreme Court held in *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976), that at some point -- "as the degree of bodily invasion increases and the prognosis dims," 355 A.2d at 664 -- the individual's liberty/privacy right might outweigh the state's interest in life. That point, however, is a considerable distance from the starting point of unbridled personal autonomy, and should be set only upon due regard for the nature and weight of the state interest.

Here, the State of Missouri, through its highest court, has identified its interest in life as "embrac[ing] two separate concerns: an interest in the prolongation of life of the individual patient and an interest in the sanctity of life

itself." 760 S.W.2d at 408. As the Missouri Supreme Court found, both of these concerns are implicated to a substantial degree in this case -- the interest in prolongation of life because the patient is not terminally ill and may live for many years if her basic sustenance is maintained; and the interest in sanctity of life because "life is precious and worthy of preservation without regard to its quality." *Id.* The weight of the state's interest is thus considerable. In contrast, the burden on the patient, as determined by the Missouri Supreme Court, is minimal. *Id.* at 423-24.

For the Court to reverse the decision below, it would have to hold that despite the substantial interest Missouri has asserted in preserving Nancy Cruzan's life, and the absence of any oppressive burden upon her, the state's interest is not sufficiently compelling to overcome her fundamental constitutional right to refuse life-sustaining nutrition and hydration. Such a holding would represent a significant -- and in our view, an alarming -- departure from established legal and moral precedent.

III. NOTHING IN THE CONSTITUTION PROHIBITS THE STATES FROM INSISTING ON THE HIGHEST CALIBER OF EVIDENCE REGARDING THE PATIENT'S OWN WISHES WHEN THIRD PARTIES SEEK TO ASSERT AN INCOMPETENT PATIENT'S RIGHT TO TERMINATE LIFE-SUSTAINING MEDICAL INTERVENTIONS

In its survey below of the leading state court decisions in the "right to die" field, 760 S.W.2d at 413-16, the Missouri

Supreme Court noted the variety of approaches to the question of a third party's authority to assert an incompetent patient's right to refuse life-sustaining medical intervention. Professor Tribe has summarized the various decisions that have employed one form or another of the theory of "substituted judgment" in authorizing the withholding or withdrawal of life-sustaining medical intervention from incompetent patients:

> "Even if a court would grant a patient's request to forego medical treatment were the patient able to express that wish, a further complication arises if the patient is unable to express that desire because incompetent. Most courts have extended to incompetent patients whatever rights competent patients have through the doctrine of substituted judgment. There are basically three approaches courts have taken to decisionmaking in treatment decisions for incompetent patients. First, if the patient had when competent stated what decision she would have wanted made in this situation, those wishes tend to be deemed decisive. Second, where there is no direct evidence of the patient's preferences, if there is a relative or a friend who was close enough to the patient to be able to surmise how she would have decided, this relative or friend may be allowed to choose in the name of the patient. Third, if there is no basis for deciding what the patient would have decided, a decision is made according to what would be in the patient's 'best

> interests', as defined by the court, by the patient's family, or by a court-appointed guardian."

Tribe, *American Constitutional Law*, sec. 15-11 at 1368-69 (2d Ed. 1988) (footnotes omitted). As Professor Tribe points out, however, "[a]ll three forms of 'substituted judgment' are at best imperfect ways to effectuate the patient's right of self-determination. No matter how much evidence there is of subjective intent, how well the guardian knew the patient, and how well-intentioned the patient's guardian, family, and physician may be, there will always be some residual doubt that the decision made in fact expresses what the patient would have wanted done." *Id.* at 1369 (footnote omitted).

Elsewhere in his treatise, Professor Tribe describes the awesome potential for abuse inherent in "substituted judgment" cases:

> "As courts become more sympathetic to arguments that persons have a right to die with dignity and that the state interest in the preservation of life may sometimes be subordinated to an individual's right to die, there is a possibility that doctrines which are intended to facilitate the exercise of this right will be exploited, either intentionally or unwittingly, to practice the most terrible discrimination against handicapped persons who require medical treatment to stay alive: judgments that their disabilities are such that persons afflicted with them would be better off dead and thus should be 'allowed' to die. The most pernicious discriminatory

> bias against the disabled that one can imagine - the desire of families or others to dispose of handicapped persons whom they simply consider undesirable - might be effectively disguised behind their requests, made in the name of the disabled's right to die, that medical treatment be withheld from the disabled. The right to die, in other words, may offer a convenient pretext for profoundly discriminatory decisionmaking."

Tribe, *supra*, sec. 16-31 at 1598-99 (footnotes omitted).

At least one prominent state court has chosen to respond to this legal and moral dilemma by insisting that life-sustaining treatment be provided to incompetent patients unless there is "clear and convincing" proof that the patient himself would have refused such treatment under his current medical circumstances. *Matter of Storar*, 52 N.Y. 2d 363, 420 N.E.2d 64, 72, *cert. denied* 454 U.S. 858 (1981). The New York Court of Appeals relied in major part on *Addington v. Texas*, 441 U.S. 418 (1979), in which this Court held that even in civil cases, which typically require no more than a "preponderance of the evidence," the higher "clear and convincing" standard is an element of due process whenever the case involves "particularly important civil interests." 441 U.S. at 424.

Last year, in *Matter of Westchester County Medical Center*, 72 N.Y. 2d 517, 531 N.E.2d 607 (1988), the New York Court of Appeals had occasion to apply its earlier decision in *Storar*. The case involved an elderly non-terminal mentally incompetent hospital patient, whose

daughters resisted the hospital's effort to insert a nasogastric tube to provide her with sustenance that would keep her alive. While she had been competent, the woman had on several occasions made statements to the effect that she would not wish to be kept alive by artificial means if she were unable to care for herself. Applying the *Storar* "clear and convincing" evidence standard, the Court of Appeals concluded that the circumstances under which the woman had made those statements did not demonstrate clearly and convincingly that she would have refused nutrition and hydration in her current non-terminal medical circumstances. 531 N.E.2d at 614-15.

In the course of its decision, the Court of Appeals in *Westchester County Medical Center* expounded upon the rationale underlying the *Storar* standard and the considerations relevant in implementing the standard:

"Every person has a right to life, and no one should be denied essential medical care unless the evidence clearly and convincingly shows that the patient intended to decline the treatment under some particular circumstances. This is a demanding standard, the most rigorous burden of proof in civil cases. It is appropriate here because if an error occurs it should be made on the side of life.

" . . . The persistance of the individual's statements, the seriousness with which those statements were made and the inferences, if any, that may be drawn from the surrounding

circumstances are among the factors which should be considered.

"The ideal situation is one in which the patient's wishes were expressed in some form of a writing, perhaps a 'living will,' while he or she was still competent. The existence of a writing suggests the author's seriousness of purpose and ensures that the court is not being asked to make a life-or-death decision based upon casual remarks."

531 N.E.2d at 613 (citations omitted).

Like the New York Court of Appeals, the Missouri Supreme Court has insisted that third parties present clear and convincing evidence that an incapacitated patient would have refused life-sustaining medical intervention under her current condition. 760 S.W.2d at 425. Its evaluation of the strength of the evidence in this case -- which, as noted above, is beyond the scope of this Court's review -- led it to conclude that no such evidence was present here. *Id.* at 424.

The question here is whether states like Missouri and New York are constitutionally *precluded* from adopting the "clear and convincing" standard as a means of ensuring that the third party is properly advancing the incapacitated patient's liberty/privacy right. We submit that the question answers itself. If anything, in view of the due process analysis of *Addington v. Texas, supra*, and in view of the inherently personal nature of the liberty/privacy right the third party is seeking to assert on the patient's behalf, it would seem that the "clear and convincing" standard should

be constitutionally *required*. States that allow third parties to decide that patients should die without such probative evidence of the patient's intent run the risk of countenancing "the most pernicious discriminatory bias against the disabled that one can imagine." Tribe, *supra*, at 1598.

CONCLUSION

> "Therefore was man created singly, to teach you that whoever destroys a single life is considered by Scripture as if he had destroyed an entire world; and that whoever preserves a single life is considered by Scripture as if he had preserved an entire world." (*Mishnah*, Tractate *Sanhedrin* [Judges] 4:5)

Although the sages of yore may have been speaking homiletically, their teaching has literal application in cases like this. This Court's decision will set standards and guidelines that will have ramifications far beyond the individual patient whose life hangs in the balance here. Many, many lives will be affected by the Court's decision -- and so too will the general moral health of American society.

A reversal of the Missouri Supreme Court's decision on federal constitutional grounds would require the Court to elevate a non-terminal patient's right to refuse life-sustaining nutrition and hydration into a fundamental constitutional liberty/privacy right, to relegate the state's countervailing interest in the preservation and sanctity of human life to non-compelling secondary status, and to preclude states from insisting that third parties seeking to

assert such a right on behalf of incapacitated patients must present clear and convincing evidence of the patient's own wishes. The implications of such a holding -- in both legal and moral terms -- would be staggering. In Agudath Israel of America's view, reversal of the decision below would constitute far more than the first cautious step down a slippery slope; it would represent a giant slalom leap far down the trail of constitutionalizing a general right to suicide and euthanasia.

For the reasons stated above, *amicus curiae* Agudath Israel of America urges the Court to affirm the decision of the Missouri Supreme Court by acknowledging the authority of states (i) to assert an interest in the preservation and sanctity of human life sufficiently compelling to outweigh any fundamental liberty/privacy rights non-terminal patients like Nancy Cruzan may have to refuse life-sustaining medical intervention; and (ii) to insist that where life support is sought to be withheld or terminated on the basis of an incapacitated patient's purported wishes, the quality of evidence adduced to demonstrate those wishes must be of the highest caliber.

Respectfully submitted,

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